UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MELISSA ASHLEY WINSOR, Plaintiff, v. CAROLYN W. COLVIN, Acting Commissioner of Social Security, Defendant.	CASE NO. C13-1098-MJP-MAT REPORT AND RECOMMENDATION RE: SOCIAL SECURITY DISABILITY APPEAL

Plaintiff Melissa Ashley Winsor proceeds through counsel in her appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's applications for Supplemental Security Income (SSI) and Disability Insurance Benefits (DIB) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda, the Court recommends this matter be AFFIRMED.

FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1983.[1] She obtained her GED and previously worked as

1 Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case

a janitor, hardware salesperson, truck and trailer rental clerk, fast food worker, floor installer, and medical equipment tech. (AR 32, 47.)

Plaintiff filed applications for SSI and DIB in October 2010, alleging disability since October 13, 2009. (AR 177-82.) Her applications were denied initially and on reconsideration, and she timely requested a hearing.

ALJ Stephanie Martz held a hearing on February 6, 2012, taking testimony from plaintiff and a vocational expert (VE). (AR 40-66.) On April 19, 2012, the ALJ rendered a decision finding plaintiff not disabled. (AR 22-34.) Plaintiff timely appealed.

The Appeals Council denied plaintiff's request for review on May 22, 2013 (AR 1-7), making the ALJ's decision the final decision of the Commissioner. Plaintiff appealed this final decision of the Commissioner to this Court.

JURISDICTION

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

DISCUSSION

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not engaged in substantial gainful activity since October 13, 2009, the alleged onset date. At step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff's fibromyalgia, trochanteric bursitis, cervicalgia, cervical radiculitis, and shoulder impingement, status post arthroscopy with subacromial decompression severe. She

found no severe mental impairment. Step three asks whether a claimant's impairments meet or equal a listed impairment. The ALJ found plaintiff's impairments did not meet or equal the criteria of a listed impairment.

If a claimant's impairments do not meet or equal a listing, the Commissioner must assess residual functional capacity (RFC) and determine at step four whether the claimant has demonstrated an inability to perform past relevant work. The ALJ found plaintiff had the RFC to perform sedentary work, with the following exceptions: she can lift and carry ten pounds occasionally and less than ten pounds frequently; she can sit for about six hours in an eight-hour workday, and stand and/or walk for about two hours in an eight-hour workday with regular breaks; and she can reach, handle, and finger frequently. With this RFC, the ALJ found plaintiff unable to perform any past relevant work.

If a claimant demonstrates an inability to perform past relevant work, the burden shifts to the Commissioner to demonstrate at step five that the claimant retains the capacity to make an adjustment to work that exists in significant levels in the national economy. With consideration of the Medical-Vocational Guidelines and VE testimony, the ALJ concluded there were jobs existing in significant numbers in the national economy plaintiff could perform, such as work as a stuffer of toy and sports equipment, surveillance systems monitor, and telemarketer. The ALJ, therefore, concluded plaintiff was not disabled at any time since the application date.

This Court's review of the final decision is limited to whether the decision is in accordance with the law and the findings supported by substantial evidence in the record as a whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means

more than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the final decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

Plaintiff argues the ALJ erred in rejecting a treating physician's opinion, in relation to the VE testimony at step five, in failing to find a severe mental impairment, and in assessing her credibility. She requests remand for an award of benefits or, in the alternative, for further administrative proceedings. The Commissioner maintains the ALJ's decision has the support of substantial evidence and should be affirmed.

Physician's Opinions as to Physical Limitations

Plaintiff argues the ALJ erred in rejecting the opinions of her treating physician, Dr. Kelly Evans, as to her functional limitations and in finding she can frequently perform reaching, handling, and fingering. Dr. Evans assessed plaintiff on a number of occasions with limitations amounting to less than sedentary work. (AR 370-73, 378, 453-54, 551-62.) In March 2011, for example, Dr. Evans assessed plaintiff as able to stand/walk and sit for zero to two hours in an eight-hour day, unable to lift any weight, rarely able to finger, grasp, handle, stoop, or crouch, and subject to missing work more than four days per month. (AR 378.)

The ALJ gave little weight to the opinions of Dr. Evans, concluding they appeared to be based on plaintiff's subjective self-report and that plaintiff's treatment records reflect minimal objective findings supporting the opined limitations. (AR 28-30.) The ALJ elaborated:

> . . . Dr. Evans' treatment notes reflect minimal objective findings. She has

> recorded that the claimant has "some" tenderness and reduced range of motion. She has also noted that the claimant has disc protrusions. However, she has not explained how these findings show that the claimant cannot work an 8-hour day, be unable to sit or stand and/or walk for more than 2 hours, or would cause 4 or more absence in a month. Further, Dr. Evans has not explained why the claimant would be unable to perform a sedentary job that did not require a significant amount of time walking or standing.

(AR 30.) The ALJ afforded some weight to the contradictory opinion of reviewing State agency physician Dr. Robert Hoskins, who found plaintiff capable of light work, with no other physical limitations. (AR 30-31, 91-92.) The ALJ assessed plaintiff as limited to sedentary work, with additional limitations, based on evidence received at the hearing and giving plaintiff "some benefit of the doubt[.]" (AR 31.)

As a treating physician, the opinions of Dr. Evans were entitled to greater weight than the opinions of non-examining physician Dr. Hoskins. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996) (more weight given to opinions of treating physician than to non-treating physician, and more weight to opinion of examining physician than to non-examining physician). Given the existence of contradictory opinion evidence, the ALJ was required to provide "'specific and legitimate reasons' supported by substantial evidence in the record" for rejecting the opinions of Dr. Evans. *Id*. at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)). *See also id.* at 831 ("The opinion of a nonexamining physician cannot by itself constitute substantial evidence that justifies the rejection of the opinion of either an examining physician or a treating physician."), and *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir.1995) ("[T]he report of a nonexamining, nontreating physician need not be discounted when it 'is not contradicted by *all other evidence* in the record.'") (quoting *Magallanes*, 881 F.2d at 752 (emphasis in original)).

Plaintiff provides a lengthy description of the medical evidence of record as supporting a greater degree of functional limitations. (*See* Dkt. 16 at 5-18.) She points to various objective findings by Dr. Evans and from other medical providers on examination, such as hesitancy or pain with movement, tenderness in the right shoulder, positive trigger points, and limitation in range of motion (*see, e.g.*, AR 326-29, 356, 399, 401, 405, 408-09), as well as testing results, including x-rays documenting OS acromiale of the right shoulder and a nerve conduction study showing a C6 radiculopathy (AR 356-57, 405). Plaintiff observes that an ALJ may only reject a doctor's opinion if the opinion was *substantially* based on *incredible* claimant testimony. *Morgan v. Comm'r Soc. Sec. Admin.*, 169 F.3d 595, 602 (9th Cir. 1999) ("A physician's opinion of disability 'premised to a large extent upon the claimant's own accounts of his symptoms and limitations' may be disregarded where those complaints have been 'properly discounted.'") (quoted sources omitted). Pointing to her fibromyalgia, plaintiff argues the ALJ erred in "'effectively requiring "objective" evidence for a disease that eludes such measurement.'" *Benecke v. Barnhart*, 379 F.3d 587, 594 (9th Cir. 2004) (quoting *Green-Younger v. Barnhart*, 335 F.3d 99, 108 (2d Cir. 2003)).

Plaintiff also contends the ALJ failed in her duty to develop the record in not obtaining prior Department of Social and Health Services paperwork completed by Dr. Evans, as well as other medical records, pointing to paperwork she provided to the Appeals Council for review. (AR 551-65.) Plaintiff maintains that, given the failure to provide adequate reasoning in relation to Dr. Evans, her opinion should be credited as a matter of law and benefits awarded. *Lester*, 81 F.3d at 834. However, for the reasons set forth below, the Court finds no error in the ALJ's consideration of the medical evidence.

"[T]he ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and for resolving ambiguities." *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998) (citing *Andrews*, 53 F.3d at 1039). *Accord Carmickle v. Comm'r of SSA*, 533 F.3d 1155, 1164 (9th Cir. 2008); *Thomas*, 278 F.3d at 956-57. The ALJ must support her findings with "specific, cogent reasons." *Reddick*, 157 F.3d at 722 (citing *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990)). When evidence reasonably supports either confirming or reversing the ALJ's decision, we may not substitute our judgment for that of the ALJ. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999).

The ALJ in this case described the medical record in detail. She noted, for example, plaintiff's report at a pain clinic, in both September 2009 and January 2011, of moderate pain and moderate functional limitation interfering "only with some daily activities." (AR 27-28 (citing AR 282-83, 355-57).) The ALJ took note of imaging results, including a September 2009 MRI showing only "minimal" disk bulges, not resulting in any neural impingement, the os acromiala of the right shoulder found in July 2010, an "unremarkable" October 2010 MRI of plaintiff's thoracic spine, and an October 2010 MRI of her lumbar spine showing "no significant abnormality." (AR 27-28 (citing AR 287-88, 481-83).) The ALJ also took note of various observations and findings on examination by a number of different medical providers, including, *inter alia*, plaintiff's "mildly symptomatic" right shoulder impingement with os acromiale in September 2010 (AR 27 (citing AR 327-28)), a November 2010 opinion that plaintiff's neck and shoulder pain were muscle-spasm mediated and should be treated with physical therapy (*id.* (citing AR 375-77)), a March 2011 finding of no muscle strength loss and no sensory deficits (AR 28 (citing AR 363-66)), and an April 2011 finding of "mildly positive

Hawkins impingement test," positive Spurling test, and that she was "neurovascuarly intact in the bilateral upper extremities[,]" (AR 29 (citing AR 440-41).

The ALJ also focused specifically on the records from Dr. Evans and acknowledged that physician's objective findings. (*See* AR 28-30.) However, she also noted the limited or minimal nature of Dr. Evans' findings. (*See, e.g., id*. ("On examination, Dr. Evans noted that the claimant had "*some* hesitancy with movement of both of her arms, with '*some* pain' especially at shoulder level."; "She has *normal* range of motion bilaterally of the shoulder and *some* pain with neck movement."; "exam reflects *minimal* objective findings.") (citing AR 389, 408-09, 457; emphasis added.) The ALJ additionally described more recent imaging results, including a November 2011 MRI showing "minor disc protrusions at C5-6 and C6-7, without significant spinal stenosis or neural foraminal narrowing[]" and that was "otherwise normal[,]" and a November 2011 MRI showing "Os acromiale, with minimal bone edema and adjacent soft tissue edema[,]" and "[v]ery mild subacromial- subdeltoid brusistis." (AR 30 (citing AR 541-42).) The ALJ further observed that, following a January 2010 arthroscopy of the right shoulder with subacromial decompression, plaintiff was referred to physical therapy and her rehabilitation was "not expected to be a long-term process." (*Id*. (citing AR 535, 547-49).) Finally, with respect to plaintiff's fibromyalgia argument, it should be noted that the ALJ found that condition severe, along with several other physical impairments. (AR 24.)

Given the above, the ALJ can be said to have reasonably construed the medical record as reflecting Dr. Evans' reliance on plaintiff's subjective reports, which the ALJ properly found not credible for the reasons discussed below. *Bray v. Comm'r of SSA*, 554 F.3d 1219, 1228 (9th Cir. 2009) (ALJ may reasonably discount a physician's prescription of work restrictions

based on claimant's less than credible statements); *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008 ("An ALJ may reject a treating [or examining] physician's opinion if it is based 'to a large extent' on a claimant's self-reports that have been properly discounted as incredible.") (quoting *Morgan*, 169 F.3d at 602). She also reasonably found the opinions not supported by the objective medical evidence in Dr. Evans' treatment notes or the other objective medical evidence. *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005) (rejecting physician's opinion due to discrepancy or contradiction between opinion and the physician's own notes or observations is "a permissible determination within the ALJ's province."); *Thomas*, 278 F.3d at 957 ("The ALJ need not accept the opinion of any physician, including a treating physician, if that opinion is brief, conclusory, and inadequately supported by clinical findings.") *See also Batson v. Commissioner*, 359 F.3d 1190, 1195 (9th Cir. 2004) (a treating physician's opinions may be discounted when it is "in the form of a checklist, did not have supportive objective evidence, was contradicted by other statements and assessments of [the claimant's condition], and was based on [the claimant's] subjective descriptions of pain[,]" as well as when that opinion is "conclusory, brief, and unsupported by the record as a whole . . . or by objective medical findings[.]")

Plaintiff presents an alternative interpretation of the medical record. However, as argued by the Commissioner, plaintiff's interpretation, even if reasonable, does not demonstrate a lack of substantial evidence support for the ALJ's equally reasonable interpretation. *Morgan*, 169 F.3d at 599 ("Where the evidence is susceptible to more than one rational interpretation, it is the ALJ's conclusion that must be upheld.") (citing *Andrews*, 53 F.3d at 1041). The ALJ further reasonably considered the existence of contradictory opinion

evidence from a non-examining physician, but gave plaintiff the benefit of the doubt in finding her more limited than assessed by that physician. (AR 30-31.)

Finally, plaintiff fails to demonstrate that the additional records provided to the Appeals Council detract from the substantial evidence support for the ALJ's decision. In fact, as observed by the Commissioner, some of the assessments from Dr. Evans reflect plaintiff's ability to perform a range of sedentary work (AR 556-58, 563-65), while a June 2012 examination by another physician reveals no joint deformities, full range of motion without pain, and normal gait and station (AR 593-96). For this reason, and for the reasons set forth above, the Court finds no error established in relation to Dr. Evans or the medical record as a whole.

VE Testimony at Step Five

Plaintiff avers reversible error in the failure to proffer a hypothetical to the VE limiting her to frequent reaching, handling, and fingering. (*See* AR 64-65.) As plaintiff observes, a hypothetical posed to a VE must include all of the claimant's functional limitations supported by the record. *Thomas*, 278 F.3d at 956 (citing *Flores v. Shalala*, 49 F.3d 562, 520-71 (9th Cir. 1995)). A VE's testimony based on an incomplete hypothetical lacks evidentiary value to support a finding that a claimant can perform jobs in the national economy. *Matthews v. Shalala*, 10 F.3d 678, 681 (9th Cir. 1993) (citing *DeLorme v. Sullivan*, 924 F.2d 841, 850 (9th Cir. 1991)). *Accord Lewis v. Apfel*, 236 F.3d 503, 517-18 (9th Cir. 2001).

Also, the Dictionary of Occupational Titles (DOT) raises a rebuttable presumption as to job classification. *Johnson v. Shalala*, 60 F.3d 1428, 1435-36 (9th Cir. 1995). Pursuant to Social Security Ruling (SSR) 00-4p, an ALJ has an affirmative responsibility to inquire as to

whether a VE's testimony is consistent with the DOT and, if there is a conflict, determine whether the VE's explanation for such a conflict is reasonable. *Massachi v. Astrue*, 486 F.3d 1149, 1152-54 (9th Cir. 2007).

In this case, the VE testified that an individual could perform the jobs identified by the ALJ at step five in response to a hypothetical that did not contain any limitations on reaching, handling, or fingering. (AR 64.) When asked whether a limitation to only occasional reaching, handling, and fingering would eliminate those jobs, the VE responded that "all those jobs require fingering, feeling, manipulation on a continual basis." (AR 65.) As the Commissioner notes, the use of the term "continual" differs from the terms of art utilized in the DOT – including "frequently," meaning "from 1/3 to 2/3 of the time," and "constantly," meaning from 2/3 or more of the time." DOT, App. C. The ALJ failed to inquire into the VE's understanding as to the term continual, or to proffer a hypothetical specifying a limitation to frequent reaching, handling, and fingering. The ALJ also did not, subsequent to the VE's testimony, confirm its consistency with the DOT. The ALJ did, on the other hand, initially obtain from the VE agreement to advise her as to any conflict in his testimony with the DOT. (AR 62.) The ALJ further, in her decision, noted the omission of the limitation at issue in the hypothetical to the VE, but clarified that review of the DOT shows that the jobs identified by the VE do not require more than frequent reaching, handling, and fingering. (AR 33.)

While the ALJ appears to have obtained sufficient testimony on the issue of consistency with the DOT, she erred in failing to obtain testimony from the VE based on a complete hypothetical. However, for the reasons set forth below, the Court concludes that the ALJ's step five error should be deemed harmless.

As a general principle, an ALJ's error may be deemed harmless where it is "'inconsequential to the ultimate nondisability determination.'" *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012) (cited sources omitted). The Court looks to "the record as a whole to determine whether the error alters the outcome of the case." *Id*. At step five, for example, the failure to obtain confirmation as to the consistency of a VE's testimony with the DOT can be deemed harmless where a plaintiff fails to identify any actual conflict with the DOT. *Rushing v. Astrue*, No. 08-36001, 2009 U.S. App. LEXIS 28292 *4 (9th Cir. Dec. 23, 2009) (citing *Massachi*, 486 F.3d at 1153-54 [n. 19] ("This procedural error could have been harmless, were there no conflict, or if the vocational expert had provided sufficient support for her conclusion so as to justify any potential conflicts, as in *Johnson*. Instead, we have an apparent conflict with no basis for the vocational expert's deviation."))

In this case, while failing to include the limitation in the hypothetical to the VE, the ALJ properly took administrative notice that the DOT does not require more than frequent reaching, handing, or fingering for the jobs identified at step five. *See* 20 C.F.R. §§ 404.1566, 416.966 (at step five, the Commissioner takes administrative notice of reliable job information in DOT and other publications). Indeed, as set forth in the Selected Characteristics of Occupations (SOC), the surveillance system monitor job (DOT 379.367-010) does not require any reaching, handling, or fingering (i.e., activity or condition "not present" in job), while the toy and sport equipment stuffer job (DOT 731.685-014) requires frequent reaching and handling and only occasional fingering, and the telemarketer job (DOT 299.357-014) requires only occasional reaching and handling, and frequent fingering. U.S. Dep't of Labor, Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles Appx. C (1993). As

such, with consideration of both the VE testimony and the evidence from the DOT and SOC, any error in relation to the limitation to frequent reaching, handling, and fingering can be deemed harmless. *Rushing*, 2009 U.S. App. LEXIS 28292 at *3-4 (ALJ's error in crafting hypothetical to VE harmless where VE testified claimant could perform a job, the Commissioner properly took administrative notice that the job identified did not require the restriction on use of hands or wrists, and the job existed in significant numbers in national economy) (citing, in relevant part, 20 C.F.R. § 404.1566(d) and the SOC).

In fact, had the VE testified that the jobs identified required more than frequent reaching, handling, and fingering, such testimony would have been in conflict with the DOT and required an explanation for the deviation. Plaintiff, while disagreeing with the ALJ's conclusion as a general matter (*see* Dkt. 16 at 20), provides no support for the contention that the jobs identified at step five are precluded by the RFC assessed. The Court, as such, finds the error in the hypothetical, and any error in relation to an inquiry into DOT consistency, harmless based on an absence of evidence of an actual conflict with the DOT.

Mental Impairment

Plaintiff assigns error to the ALJ's rejection of diagnoses of mental impairments by treating physician Dr. Evans and nurse practitioner Arthur Kearney. However, the Court also finds no error established in the ALJ's consideration of plaintiff's mental impairments.

The ALJ found no severe mental impairments at step two. She described plaintiff's consultative evaluation by Dr. Anselm Parlatore in January 2011 and afforded significant weight to his opinion that plaintiff had no psychiatric diagnosis, finding it consistent with the minimal objective evidence to substantiate a mental impairment. (AR 25, 346-49.) She also

described Kearney's December 2011 evaluation of plaintiff and diagnoses of obsessive/ compulsive disorder (OCD), generalized anxiety disorder, major depressive disorder, recurrent, moderate, and cannabis dependence, but concluded she could not use these diagnoses to establish a medically determinable impairment because Kearney is not an "acceptable medical source."[2] (AR 25, 500-04.)

The ALJ next noted plaintiff had attended counseling, but engaged in only conservative treatment for mental complaints. (AR 25.) She also discussed the notation of depression and anxiety by treating physician Dr. Evans, but found that "treatment appears to be focused on her physical impairments and not mental conditions." (*Id*. (citing AR 371).) The ALJ reasoned:

> The record does not reflect objective medical evidence to substantiate the claimant's subjective complaints of mental problems. Given the lack of treatment, lack of medications, and Dr. Parlatore's evaluation which found no evidence of a mental impairment, I find that the record does not establish a medically determinable mental impairment. This finding is supported by the opinion of a state agency medical consultant, Thomas Clifford, PhD, who reviewed the claimant's records on May 5, 2011 and found that she had no mental medically determinable impairment ([AR 86-102]). This finding is given significant weight as it is consistent with the record. Thus, I do not find that the claimant has a mental medically determinable impairment.

(AR 25.)

The ALJ further found that, even if the evidence could be construed as sufficient to establish a medically determinable mental impairment of anxiety and depression, the evidence did not establish any limitations in the four areas of functioning under the "B" criteria of the

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2 Social Security regulations distinguish between "acceptable medical sources" and "other sources." Acceptable medical sources include, for example, licensed physicians and psychologists, while other non-specified medical providers, such as nurse practitioners, are considered "other sources." 20 C.F.R. §§ 404.1513(a) and (e), 416.913(a) and (e), and SSR 06-03p.

listings of impairments. (AR 25-26.) That is, she found plaintiff failed to demonstrate any deficits in activities of daily living, social functioning, or concentration, persistence, or pace, and no evidence of any episodes of decompensation. (*Id*.)

At step two, a claimant must make a threshold showing that her medically determinable impairments significantly limit her ability to perform basic work activities. *See Bowen v. Yuckert*, 482 U.S. 137, 145 (1987) and 20 C.F.R. §§ 404.1520(c), 416.920(c). "Basic work activities" refers to "the abilities and aptitudes necessary to do most jobs." 20 C.F.R. §§ 404.1521(b), 416.921(b). "An impairment or combination of impairments can be found 'not severe' only if the evidence establishes a slight abnormality that has 'no more than a minimal effect on an individual's ability to work.'" *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996 (quoting SSR 85-28). "[T]he step two inquiry is a de minimis screening device to dispose of groundless claims." *Id*. (citing *Bowen*, 482 U.S. at 153-54). An ALJ is also required to consider the "combined effect" of an individual's impairments in considering severity. *Id*.

A diagnosis alone is not sufficient to establish a severe impairment. Instead, a claimant must show that her medically determinable impairments are severe. 20 C.F.R. §§ 404.1520(c), 416.920(c). She must, therefore, present evidence of a medically determinable impairment, through signs, symptoms, and laboratory findings, that has lasted or can be expected to last for a continuous period of not less than twelve months. *Ukolov v. Barnhart*, 420 F.3d 1002, 1004-05 (9th Cir. 2005).

The ALJ in this case reasonably found an absence of evidence to support the existence of a medically determinable mental impairment. While Dr. Evans did identify plaintiff's depression, anxiety, and OCD as impacting her condition, she provided no signs, symptoms, or

clinical findings in support of these diagnoses. (*See* AR 371.) Plaintiff points to a May 2011 assessment from Dr. Evans as supporting limitations in relation to concentration and task attendance. (AR 453.) However, the document cited appears to reflect plaintiff's report of these symptoms and, in fact, detracts from plaintiff's contention that her mental impairments significantly limited her ability to perform work activities. (AR 453-54 ("The patient does find that her pain causes a lack of concentration and attention pretty much constantly, but she does feel that she is able to work in a low stress job and may be able to do this, but she is limited somewhat by her pain, anxiety, and depression."; " . . . [S]he does have ongoing anxiety and depression which may limit her ability to have a less stressful job."))

As the Commissioner observes, "'[r]egardless of how many symptoms an individual alleges, or how genuine the individual's complaints may appear to be, the existence of a medically determinable physical or mental impairment cannot be established in the absence of objective medical abnormalities; i.e., medical signs and laboratory findings[.]'" *Ukolov*, 420 F.3d at 1005 (quoting SSR 96-4p). The ALJ in this case reasonably considered the absence of any supporting evidence from Dr. Evans, and the fact that both examining physician Dr. Parlatore and non-examining State agency physician Dr. Clifford found no evidence of a medically determinable impairment. In fact, the only objective evidence from an acceptable medical source in the record consists of the results of Dr. Parlatore's mental status examination (MSE), which, as stated above, revealed an absence of any psychiatric diagnosis. (AR 348-49.)

Nor did the ALJ err in declining to use the evidence from nurse practitioner Kearney to establish the existence of a medically determinable mental impairment. As plaintiff concedes,

once an impairment is established with evidence from an "acceptable medical source," evidence from "other sources," such as a nurse practitioner, is considered to show the severity of an impairment and how it affects a claimant's ability to work. 20 C.F.R. §§ 404.1513(d)(1), 416.913(d)(1). *See also* §§ 404.1513(a), 416.913(a) ("We need evidence from acceptable medical sources to establish whether you have a medically determinable impairment(s).") Here, as stated above, the record contained no evidence from an acceptable medical source sufficient to establish the existence of a medically determinable mental impairment. Therefore, evidence from nurse practitioner Kearney did not suffice to establish the existence of an impairment. SSR 06-3p ("Information from these 'other sources' cannot establish the existence of a medically determinable impairment. Instead, there must be evidence from an 'acceptable medical source' for this purpose.")

Moreover, the evidence from Kearney does not otherwise support the existence of a medically determinable mental impairment. That is, outside of diagnoses and plaintiff's report of symptoms, the MSE conducted by Kearney revealed no findings supporting the existence of any mental impairment other than the observation of a "flat, depressed" affect. (AR 502-03 (noting cooperative, relaxed behavior; mood, speech, and language within normal limits; no anxious behavior; linear, logical, and goal directed thought process with full orientation; ability to perform serial sevens, reverse spelling, item and fact recall, identify similarities and differences, and abstract meaning of proverb; memory intact in all spheres; fund of knowledge above average; and insight and judgment intact and good).) Plaintiff, as such, fails to demonstrate any error in relation to mental impairments.

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Credibility

Absent evidence of malingering, an ALJ must provide clear and convincing reasons to reject a claimant's testimony. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007) (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991)). *See also Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001). "General findings are insufficient; rather, the ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834. "In weighing a claimant's credibility, the ALJ may consider his reputation for truthfulness, inconsistencies either in his testimony or between his testimony and his conduct, his daily activities, his work record, and testimony from physicians and third parties concerning the nature, severity, and effect of the symptoms of which he complains." *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

In this case, the ALJ found that, while plaintiff's medically determinable impairments could reasonably be expected to cause some of the alleged symptoms, she did not find all of plaintiff's symptom allegations credible. Again, the Court is not persuaded by plaintiff's challenges to the ALJ's decision.

A. Objective Evidence

Plaintiff argues error in the ALJ's improper requirement of objective evidence of her degree of pain, both as a general matter and as related to her fibromyalgia. However, "[w]hile subjective pain testimony cannot be rejected on the sole ground that it is not fully corroborated by objective medical evidence, the medical evidence is still a relevant factor in determining the severity of the claimant's pain and its disabling effects." *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001); SSR 96-7p. Also, "[c]ontradiction with the medical record is a sufficient

basis for rejecting the claimant's subjective testimony." *Carmickle*, 533 F.3d at 1161 (citing *Johnson*, 60 F.3d at 1434). In this case, the ALJ reasonably construed the objective medical evidence as inconsistent with the alleged severity of plaintiff's allegations as one of several different reasons offered in support of the credibility assessment. (AR 31-32.)

B. Activities

Plaintiff next argues the ALJ misstated her ability to perform activities of daily living on a regular basis for a substantial part of the day. She points to her testimony at hearing that she uses "a little two-pound vacuum that's like one of those little sweeper type things[,]" not a normal vacuum. (AR 56.) She also asserts error in the ALJ's reliance on a possible car trip to reject her testimony regarding her difficulty sitting without a valid basis in the evidence of record. *Tackett*, 180 F.3d at 1102-03 (road trip to California not sufficient to counter physicians' opinions that claimant needed to shift positions every thirty minutes or so, where there was an absence of information as to his positioning in the car and the frequency and duration of rest stops). Plaintiff further contends that nothing in the record shows her performance of the other activities pointed to by the ALJ exceeded or contradicted her testimony of her subjective limitations. (*See* Dkt. 18 at 6-9.)

An ALJ may properly infer from evidence of a claimant's travel that she was not as limited as alleged. *See, e.g.*, *Tommasetti*, 533 F.3d at 1040. However, even assuming the ALJ in this case lacked the necessary information to make the inference drawn about plaintiff's ability to sit for significant amounts of time (*see* AR 31), any error in relation to this finding may be deemed harmless given the existence of other valid reasons for the ALJ's decision. *Carmickle*, 533 F.3d at 1162-63.

One need not be "utterly incapacitated" in order to be found disabled under the Social Security Act. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). Nonetheless, evidence of a claimant's activities may form the basis of an adverse credibility determination where those activities contradict the claimant's testimony or meet the threshold for transferable work skills. *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) (citing *Fair*, 885 F.2d at 603). *See also Molina*, 674 F.3d at 1112-13("While a claimant need not '"vegetate in a dark room"' in order to be eligible for benefits, the ALJ may discredit a claimant's testimony when the claimant reports participation in everyday activities indicating capacities that are transferable to a work setting. Even where those activities suggest some difficulty functioning, they may be grounds for discrediting the claimant's testimony to the extent that they contradict claims of a totally debilitating impairment.").

In this case, the ALJ reasonably pointed to plaintiff's own report of her activities, in December 2010 and April 2011, as demonstrating her limitations were not as significant as alleged. (AR 31.) The activities identified by the ALJ included: that she cared for her two children, then ages three and a half and five years old, prepared her children's meals, may go outside and watch them ride their bikes, and cared for a dog, while a roommate provided assistance in caring for the dog and playing with her kids; she did laundry two-to-three times per week with assistance; drove a car and shopped in stores two times per week; watched television and movies, played board games, and went to the park; and visited and watched her kids play outside. (*Id*.) The ALJ noted "that caring for children can be quite demanding both emotionally and physically," and found plaintiff's "ability to care for two young children, even with some assistance, suggests that her limitations are not as significant as alleged." (*Id*.)

The ALJ contrasted plaintiff's report at hearing that she did minimal household chores with her report in a December 2011 mental evaluation that "she vacuumed daily and could not sit down to eat a meal until she had cleaned the kitchen." (*Id*. (citing AR 500).) She also subsequently noted the report from plaintiff's mother that plaintiff "cared for her two young children, including helping them get dressed, preparing their meals, and driving them to school." (*Id*.)

The ALJ reasonably relied on the evidence of plaintiff's activities. *Orn*, 495 F.3d at 639; *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001); *Thomas*, 278 F.3d at 958-59. *See also Rollins*, 261 F.3d at 857 (ALJ appropriately considered plaintiff's ability to care for her children while husband worked long hours six days a week, along with other evidence of numerous activities outside the home). Indeed, "[o]ne strong indication of the credibility of an individual's statements is their consistency, both internally and with other information in the case record." SSR 96-7p. While plaintiff views the activities cited by the ALJ as minimal, she fails to demonstrate the ALJ's interpretation of this evidence, including plaintiff's ability to care for two small children, was not rational.

C. Other Reasons

The ALJ noted that plaintiff rated her pain as moderate and only reported "some" limitations with her activities to medical providers, and that she has not always sought consistent significant treatment for her impairments during the period at issue, suggesting her limitations are not as significant as alleged. (AR 31.) The ALJ, therefore, provided additional clear and convincing reasons for finding plaintiff less than fully credible. *See Tonapetyan*, 242 F.3d at 1148 (ALJ appropriately considers inconsistency with the evidence and a tendency to exaggerate in rejecting a claimant's testimony); *Greger v. Barnhart*, 464 F.3d

968, 972 (9th Cir. 2006) (ALJ may consider a claimant's inconsistent or non-existent reporting of symptoms); and *Tommasetti*, 533 F.3d at 1039 (ALJ appropriately considers an unexplained or inadequately explained failure to seek treatment or follow a prescribed course of treatment); *Parra v. Astrue*, 481 F.3d 742, 750-51 (9th Cir. 2007) (stating that "evidence of 'conservative treatment' is sufficient to discount a claimant's testimony regarding severity of an impairment"). For this reason, and for all of the reasons set forth above, plaintiff fails to demonstrate reversible error in the ALJ's credibility assessment.

CONCLUSION

For the reasons set forth above, this matter should be AFFIRMED.

DATED this 12th day of February, 2014.

Mary Alice Theiler
Chief United States Magistrate Judge